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IN THE

Supreme Court of the United States

No. 543

KECO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of The Case	3
The Questions Are Substantial	6
Conclusion	15
Appendices	1a
Appendix A—Opinion of Supreme Court of Ohio, 166 O. S. 254, 141 N. E. 2d 465	1a
Appendix B—Ruling of Court of Appeals for Sixth Appellate District	9a
Appendix C—Opinion of Court of Common Pleas on Defendants' Demurrer to Plaintiffs' Second Amended Petition	11a
Appendix D—Opinion of Court of Common Pleas on Defendants' Motion to Strike Plaintiffs' Third Amended Petition from Files	19a
Appendix E—Opinion of Supreme Court of Ohio In Rate Case, City of Cincinnati v. P. U. C., 161 O. S. 395, 119 N. E. 2d 619	22a
Appendix F—Text of Statutes Involved	37a
Appendix G—Judgment Entry in the Supreme Court of Ohio	44a
Appendix H—Entry Denying Application for Rehearing	46a

INDEX OF CASES

	PAGE
Anti-Fascist Committee v. McGrath, 341 U. S. 123	9-11
Arkadelphia Co. v. St. Louis S. W. R. Co., 249 U. S. 134	10
Atcheson, Topeka & Santa Fe Rwy. Co. v. P. U. C., 346 U. S. 346	2
B. & O. R. Co. v. United States, 279 U. S. 781	7-11
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673	9
Cincinnati v. P. U. C., 161 O. S. 395, 119 N. E. 2d 619	4-12
Re Cincinnati & Suburban Bell Tel. Co., 5 P. U. R. 3d 260	4
Chicago, Milwaukee and St. Paul R. Co. v. Minnesota, 134 U. S. 418	8
Colteryahn Sanitary Dairy v. Milk Control Comm., 322 Pa. 15, 1 Atl. 2d 775	11-13
De Lima v. Bidwell, 182 U. S. 1 (1901)	9
Farncomb v. Denver, 252 U. S. 7	7
Great Miami Valley Taxpayers Association v. P. U. C., 131 O. S. 285, 2 N. E. 2d 777	7
Haebler v. Myers, 152 N. Y. 363, 30 N. E. 963	13
Hiler v. Hiler, 35 O. S. 645	7
Hoppas v. Bremer, 119 Kan. 411, 239 P. 961	13-14
Kansas City S. R. Co. v. Road Improvement District, 256 U. S. 658	2
Lima v. P. U. C., 106 O. S. 379, 140 N. E. 147	7
Lyrle v. Payette-Oregon Slope Irrig. Dist., 175 Or. 276, 152 P. 2d 934	13
Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co., 2 Ill. 2d 205, 117 N. E. 2d 774	10
Missouri v. Gehner, 281 U. S. 313	6

Natural Gas Pipeline Co. of America v. Harrington, 139 F. Supp. 452 11-14

Ohio Bell Tel. Co. v. P. U. C., 301 U. S. 292 7

Ohio Valley Water Company v. Ben Avan Borough, 253 U. S. 287 11

Osborne v. Florida, 164 U. S. 650 7

Pacific Telephone & Telegraph Company v. Kuykendall, 265 U. S. 196 12-14

Poindexter v. Greenhow, 114 U. S. 270 9-10

Porter v. Investors Syndicate, 286 U. S. 461 (1932) 12

Truax v. Corrigan, 257 U. S. 312 9-10

United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U. S. 332 7-11

Wadley Southern Railway Company v. Georgia, 235 U. S. 651 11-13-14

Winters v. New York, 333 U. S. 507 2

INDEX OF STATUTES

Title 28, United States Code, Section 1257(2) 2

Revised Code of Ohio:

Sec. 2321.13 13

Sec. 4903.12 3

Sec. 4903.13 3-4-6

Sec. 4903.15 3-6

Sec. 4903.16 3-12

Sec. 4905.32 3

Sec. 4909.17 3

Sec. 4909.18 3

Sec. 4909.19 3
Sec. 4909.20 3

MISCELLANEOUS

Restatement of Restitution, Sec. 74, page 317 7

IN THE

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No. ——

KEGO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Ohio, entered April 17, 1957, reversing a judgment of the Court of Appeals for Hamilton County, Ohio, and affirming a judgment of the Court of Common Pleas of Hamilton County, Ohio. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 166 O. S. 254, 141 N. E. 2d 465. The Court of Appeals rendered no opinion. The two opinions of the Court of Common Pleas have not been reported. The opinion of the Supreme Court of Ohio in the 1954 Rate Case *(Cincinnati v. P. U. C.)*, out of which the instant case arises, is reported in 161 O. S. 395, 119 N. E. 2d 619 (1954). Copies of these

opinions, together with a copy of a letter ruling of the Court of Appeals, are attached hereto as Appendices A, B, C, D and E. The judgment entry in the Supreme Court of Ohio and the entry of that court denying appellants' application for rehearing are attached hereto as Appendices G and H.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered April 17, 1957, and notice of appeal was filed in that court on July 12, 1957. This appeal raises the question whether certain Ohio statutes, as construed by the Supreme Court of Ohio, are repugnant to the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by Title 28, United States Code, Section 1257(2). (App. F, 37a.) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *Atcheson, Topeka & Santa Fe Rwy. Co.* v. *P U. C.*, 346 U. S. 346, 349 (1953); *Winters* v. *New York*, 333 U. S. 507 (1948); *Kansas City S. R. Co.* v. *Road Improvement District*, 256 U. S. 658, 659-60 (1920).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. May a state statute constitutionally compel utility customers to pay excessive rates fixed by an unlawful administrative order, but strip such customers of all remedies, judicial and administrative, for restitution of the excessive rates upon reversal of the administrative order by the highest court of the state?
2. Are telephone subscribers deprived of their property without due process of law in violation of the Four-

teenth Amendment to the Constitution of the United States by the provisions of the Ohio statutes which require subscribers to pay excessive telephone rates fixed by an unlawful order of the Ohio Public Utilities Commission but which (a) abrogate all judicial remedies for restitution of such excessive rates upon reversal of the Commission's unlawful order by the Supreme Court of Ohio, and (b) fail to provide any substitute administrative remedy for refund or other means of restitution of such excessive rates?

STATUTES INVOLVED

Sections 4903.12, 4903.13, 4903.15, 4903.16, 4905.32 and 4909.17-19, inc., of the Revised Code of Ohio are set forth in Appendix F hereto. It is the position of appellants that these statutes, as construed by the Supreme Court of Ohio in this case, are repugnant to the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. On September 1, 1952 the Cincinnati & Suburban Bell Telephone Company (hereinafter called "Cincinnati Bell"), the appellee in this case, filed an application with the Public Utilities Commission of Ohio pursuant to Section 4909.18 of the Revised Code of Ohio for authority to increase its intrastate rates.

2. Protests against the rate increase were filed by the City of Cincinnati and the Cincinnati Retail Merchants Association in accordance with Section 4909.20 of the Revised Code.

3. On May 28, 1953 the Commission entered an order approving the requested rate increase in full. The increase in rates produced additional gross revenue of about $4,600,000 a year. As provided by the order, the increased rates became effective June 1, 1953.

4. An appeal to the Supreme Court of Ohio from the Commission's order was taken by the City and the Retail Merchants Association pursuant to Section 4903.13 of the Revised Code. On May 12, 1954 the court held that the Commission's order was unlawful and unreasonable and reversed the order. *Cincinnati* v. *P. U. C.*, 161 O. S. 395, 119 N. E. 2d 619 (1954). (App. E.) The court held that in fixing the rates the Commission had erroneously allowed temporary excess profits taxes and pension plan contributions as recurring annual expenses and that it had improperly computed the rate base. The court remanded the case to the Commission for further proceedings in accordance with its opinion.

5. The amount that had been improperly allowed by the Commission for excess profits taxes and pension plan contributions was $1,653,334 per year. As required by and pursuant to the court's mandate, the Commission ordered Cincinnati Bell forthwith to reduce its increased rates by an amount sufficient to reduce its annual gross revenue by $1,653,334. *Re Cincinnati & Suburban Bell Tel. Co.*, 5 P. U. R. 3d 260 (1954).

6. Pursuant to the Commission's order Cincinnati Bell reduced its rates, effective June 5, 1954. As alleged in the third amended petition, such reduced rates were the "maximum rates and charges the defendant [Cincinnati Bell] should have been authorized to collect" as determined by the court. No further appeals were taken in the rate case, and the Commission's order became final.

7. For a period of about one year (June 1, 1953-June 4, 1954) Cincinnati Bell collected and its subscribers were compelled to pay the full amount of the increased rates that had been authorized by the Commission's unlawful and subsequently reversed order. During this period Cincinnati Bell collected the $1,653,334 that the court held the

Commission had unlawfully allowed for excess profits taxes and pension costs.

8. This action was brought by appellants in the Common Pleas Court of Hamilton County, Ohio, as a representative action on behalf of themselves and all other Cincinnati Bell intrastate subscribers, for restitution of rates collected during the pendency of the appeal in excess of the lawful rates as finally fixed by the Commission in compliance with the mandate of the Ohio Supreme Court.

9. The Common Pleas Court sustained a demurrer to the second amended petition on the ground that under the Ohio public utilities statutes "the common law right of restitution is not available to the plaintiff under the circumstances of this case." (App. C, 17a-18a.) Appellants thereupon filed a third amended petition in which the federal question was raised. It alleged that if subscribers could not recover the excessive rates in this action "plaintiffs and other subscribers would have no remedy for the recovery thereof and the denial of a remedy would constitute the deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. . . ."

Upon motion of appellee the court ordered the third amended petition stricken on the ground that it was "merely an attempt to argue that if the court correctly interpreted the applicable statutes when it sustained the demurrer to the previous pleading, then such statutes must necessarily be unconstitutional." (App. D, 20a.) Final judgment was then entered for appellee.

10. An appeal from the Common Pleas judgment was taken to the Court of Appeals of Hamilton County, Ohio, which reversed the judgment and remanded the case for further proceedings according to law. (App. B, 9a.)

11. After allowance of a motion to certify the record, the Supreme Court of Ohio reversed the judgment of the

Court of Appeals and affirmed that of the Court of Common Pleas. (App. G.)

No Ohio statute contains language abrogating the common law remedy of restitution in cases of this type, and the Ohio courts had not previously construed the statutes as having such effect. Under such circumstances appellants were not "bound to anticipate such a construction" but are to be considered as having raised the constitutional question at the first opportunity if it was presented promptly after the court's decision. *Missouri* v. *Gehner*, 281 U. S. 313 (1930). This appellants did in their third amended petition.

Appellants continued to raise the federal question in both state appellate courts. It was raised in appellants' assignments of errors and briefs in the Court of Appeals. It was also argued in appellants' brief in the Supreme Court of Ohio, but the court did not explicitly pass upon the question in its opinion. Appellants again raised the federal question in an application for rehearing, but the application was denied. (App. H.)

THE QUESTIONS ARE SUBSTANTIAL

1. The Ohio statutes authorize a public utility to collect increased rates immediately upon approval of a rate increase by the Public Utilities Commission of Ohio. Section 4903.15, Revised Code of Ohio. An appeal from the Commission's order may be taken to the Supreme Court of Ohio, which is empowered to reverse, vacate or modify the order if it finds that it is "unlawful or unreasonable." Section 4903.13, Revised Code.

The Ohio statutes do not, however, authorize either the Commission or the Supreme Court to order a refund of increased rates that are collected pending appeal under authority of a Commission order later found to be unlawful and reversed by the court. Because of the absence of statu-

tory authority the Ohio Supreme Court has held that neither the Commission nor the court has authority to direct a refund. *Lima* v. *P. U. C.*, 106 O. S. 379, 140 N. E. 147 (1922); *Great Miami Valley Taxpayers Association* v. *P. U. C.*, 131 O. S. 285, 2 N. E. 2d 777 (1936); See *Ohio Bell Tel. Co.* v. *P. U. C.*, 301 U. S. 292, 294 (1937).

The only remedy of Ohio utility customers to recover excessive rates collected under such circumstances would, therefore, be the common law remedy of restitution. This remedy has always been available for the recovery of sums paid under compulsion of a judgment or administrative order subsequently reversed. *B. & O. R. Co.* v. *United States*, 279 U. S. 781 (1929); *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332 (1956); *Hiler* v. *Hiler*, 35 O. S. 645 (1880) (No N. E. citation); *Restatement of Restitution*, Section 74, page 317. In the instant case, however, the Ohio Supreme Court held that the Ohio public utility statutes have "completely abrogated the common law remedy of restitution" in cases of this type. (App. A., 7a.) Although the statutes do not expressly abrogate the common law remedy, the court construed them as having such effect, and its interpretation of the statutes is conclusive as to their meaning. *Farncomb* v. *Denver*, 252 U. S. 7, 10 (1920); *Osborne* v. *Florida*, 164 U. S. 650, 654 (1897).

The end result is that Ohio utility customers have been stripped of all remedy for recovery of excessive rates paid under the compulsion of an unlawful order of the Commission that is later reversed. They have no administrative remedy because none is provided by statute, and they have no judicial remedy because the statutes are now construed as abrogating the common law right of restitution.

As thus construed the Ohio statutes clearly violate the due process clause of the Fourteenth Amendment. They require utility customers to pay excessive rates fixed by an

unlawful Commission order but deny customers all remedy for the recovery of the excess payments when the Commission's order is later reversed. The statutes not only fail to provide an administrative remedy; they also take away the long established common law remedy. Thus a state administrative agency fixes excessive rates, the statute compels their payment pending appeal and the statute then strips customers of all remedy for recovery of the excess in rates when they are found to be excessive. No matter how arbitrary the Commission's order, the customer can never recover the excessive rates he has been compelled to pay by the Ohio statutes. It is difficult to imagine a more outright deprivation of property without due process of law.

An excessive utility rate takes the property of the customer without due process just as effectively as an inadequate rate takes the property of the utility. *Chicago, Milwaukee & St. Paul R. Co.* v. *Minnesota,* 134 U. S. 418, 459 (1890). No doubt a state can, as a matter of administrative convenience, require customers temporarily to pay excessive rates fixed by an administrative agency until the rates have been tested in the courts; but when on reversal the state also denies all remedy to recover the excessive rates, it arbitrarily and unconstitutionally takes away the money of the customers and gives it to the utility.

There is, of course, no constitutional right to any particular form of remedy. The Ohio legislature could have constitutionally abrogated the common law remedy of restitution had it substituted an adequate administrative remedy. But the legislature has afforded *no* administrative remedy. Instead it has deprived Ohio customers of the only remedy that was ever available to them for the recovery of money that they were illegally compelled to pay.

2. This Court has consistently held that a state statute that deprives a person of all remedy for the protection of

his property violates the Fourteenth Amendment. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930); *Truax* v. *Corrigan*, 257 U. S. 312 (1921); *Poindexter* v. *Greenhow*, 114 U. S. 270 (1884). See also, *De Lima* v. *Bidwell*, 182 U. S. 1, 176-7 (1901).

Brinkerhoff-Faris Co. v. *Hill, supra* involved a similar situation. For many years the Supreme Court of Missouri construed the statutes of that state as not affording an administrative remedy to contest a discriminatory tax and held that the only remedy of a taxpayer was by a suit in equity. In the *Hill* case, the court overruled its former decisions and held that an administrative remedy was available under the statutes and that, therefore, the taxpayer's suit in equity should be dismissed because the administrative remedy had not been exhausted. It was then too late for the taxpayer to avail itself of the "newly found remedy." The taxpayer was thus left with no remedy to contest the discriminatory tax. The court held that the statutes as thus construed violated the Fourteenth Amendment. Mr. Justice Brandeis stated: (281 U. S. at 679, 682)

> "The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property. . . .
>
> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In *Truax* v. *Corrigan, supra,* Mr. Justice Taft stated: (257 U. S. at 329-330)

> "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

In *Poindexter* v. *Greenhow, supra,* Mr. Justice Matthews stated: (114 U. S. at 303)

> "No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."

The right of restitution of what one has lost by enforcement of a judgment or administrative order subsequently reversed is a basic property right that originated in the early days of the common law. *Arkadelphia Co.* v. *St. Louis S. W. R. Co.,* 249 U. S. 134, 145 (1919). It has become so firmly established in American law that it is doubtful that any other case can be found in which the right of restitution has been denied when a judgment or administrative order has been reversed on the merits.[1] The right of restitution

[1] *Mandel Brothers, Inc.* v. *Chicago Tunnel Terminal Co.,* 2 Ill. 2d 205, 117 N. E. 2d 774 (1954), cited in the opinion of the Supreme Court of Ohio (App. A, 6a), merely holds that the Illinois statutes did not authorize the Illinois Public Service Commission to order a refund in such a situation. The case did not raise the issue nor did the court decide whether utility customers could obtain restitution by an appropriate action in the courts.

in such circumstances is as essential to due process as the right of appeal itself; and it is one of the "fundamental principles that adhere 'in due process of law' as understood at the time of the adoption of the constitution." See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 161-2 (1951).

Federal and state statutes have occasionally failed to provide for an administrative refund of rates collected under a rate order that is subsequently reversed. In such situations the courts have uniformly held that "the law raised an obligation" against the utility to make restitution of excessive rates paid in compliance with the reversed order and have afforded the traditional common law remedy of restitution. *B. & O. R. Co.* v. *United States*, 279 U. S. 781 (1929); *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332 (1956); *Colteryahn Sanitary Dairy* v. *Milk Control Com.*, 322 Pa. 15, 1 Atl. 2d 775 (1938); *Natural Gas Pipeline Co. of America* v. *Harrington*, 139 F. Supp. 452 (D. C. N. D. Tex., 1956).

3. Due process requires that an appeal to the courts be afforded from a rate fixing order of an administrative agency. *Wadley Southern Railway Company* v. *Georgia*, 235 U. S. 651, 660 (1915); *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287 (1920). The right to judicial review must be more than a mere formality. It must be "adequate" and "substantial" and provide effective relief from arbitrary and unreasonable administrative action. *Wadley Southern Railway Company* v. *Georgia*, *supra*, at 661. Clearly the minimum requirement of an adequate appeal from an unlawful rate order is restoration of excessive rates the utility is able to collect before the order can be reversed. This principle has long been applied in cases involving a rate order that *reduces* rates. In such situations it has been held that due process requires that the utility be afforded not only an appeal but also the right to supersede the order pending appeal; otherwise the util-

ity would be without practical protection or remedy against arbitrary Commission action if the new rates were later found to be confiscatory. *Pacific Tel. & Tel. Company* v. *Kuykendall*, 265 U. S. 196 (1924); *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932).

4. Section 4903.16 of the Revised Code of Ohio, which permits a stay of execution of a Commission order, does not help the situation. So far as utility customers are concerned the right to obtain a stay does not provide a real or a practical remedy, but an illusory one. The statute requires that in order to obtain a stay the appellant must furnish bond "conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of." In the case of an order increasing rates the damages to the utility, in the event of affirmance, would be the amount of the increased rates it was prevented from collecting by the stay pending appeal. As a practical matter no appellant in a case involving a general rate increase could ever stay execution because he could not undertake to guarantee the payment of increased rates by thousands of other customers in the event all or any portion of the increase should be upheld.

The rate case out of which this litigation arose [*Cincinnati* v. *P. U. C.*, 161 O. S. 395, 119 N. E. 2d 619 (1954)] is a case in point. In that case there were two appellants—the City of Cincinnati and The Cincinnati Retail Merchants Association—and there were more than 250,000 subscribers affected by the rate increase. The increased rates amounted to approximately $4,600,000 per year, and only a portion of this amount was contested. The City and The Retail Merchants Association could stay execution of the order only by furnishing a bond guaranteeing payment of the increased rates by more than 250,000 subscribers if the order should be affirmed in whole or in part. A remedy that requires a party to assume such an impossible burden

is no remedy at all. Thus an adequate appeal is not afforded if the appellant is required to assume the risk of paying substantial penalties in the event the contested order is affirmed. *Wadley Southern Railway Company* v. *Georgia, supra.*

The stay of execution permitted by Section 4903.16 is designed primarily to provide relief to a utility when it appeals from an order reducing its rates. It affords the utility a practical means of protecting itself from loss from an unlawful Commission order since the utility's bond guarantees repayment only of rates the utility itself has collected. Telephone subscribers, on the other hand, can never avail themselves of this relief in a case involving a general rate increase affecting hundreds of thousands of subscribers and the protection afforded by the stay is, therefore, illusory. Even if the statute permitted each subscriber to furnish his own bond a stay would not afford practical relief; obviously it would be impractical and an unreasonable burden to require each of the subscribers, many of whom have small amounts at stake, to go to the expense of furnishing bond in order to avoid being deprived of money he should never have been required to pay in the first place.

Irrespective of this, the right to stay execution has never been regarded as an adequate substitute for the right of restitution. In the case of judgments, for example, state laws generally permit the defendant to supersede the judgment pending appeal by posting bond (e.g. Section 2321.13, Revised Code of Ohio). If, however, the defendant does not supersede, he is nevertheless entitled to restitution of any amounts collected upon the judgment if it is subsequently reversed. *Colteryahn Sanitary Dairy* v. *Milk Control Com.*, 322 Pa. 15, 1 Atl. 2d 775 (1938); *Lytle* v. *Payette-Oregon Slope Irrig. Dist.*, 175 Or. 276, 152 P. 2d 934 (1944); *Haebler* v. *Myers*, 152 N. Y. 363, 30 N. E. 963 (1892); *Hop-*

pas v. *Bremer*, 119 Kan. 411, 239 P. 961 (1925); *Natural Gas Pipeline Co. of America* v. *Harrington*, 139 F. Supp. 452 (D. C. N. D. Tex., 1956).

5. The situation created by the decision of the Supreme Court of Ohio is of utmost importance in Ohio rate litigation. It will arise in every case in which an order of the Public Utility Commission authorizing a rate increase is later reversed and the increased rates found to be excessive. In every such case Ohio utility customers will be mulcted of excessive rates they are compelled to pay pending the appeal, and will be completely without remedy for their recovery.

The excessive rates paid in this case amounted to more than $1,600,000. Under the present decision of the Ohio Supreme Court this amount can never be recovered by utility customers but will be retained by the utility as a windfall. Utility customers in future rate cases might be compelled to pay even more in "unrecoverable" excessive rates fixed by an unlawful order of the Commission. In fact, the amount of excessive rates utility customers may be compelled to pay is limited only by the time in which an appeal may be prosecuted and the rates reduced.

All the cases that have previously been decided by the Court with respect to the adequacy of an appeal in rate litigation have involved the rights of a utility whose rates have been improperly ordered reduced. The Court has established the principle that due process not only requires that the utility have a right of appeal to the courts from an administrative rate order [*Wadley Southern Railway Company* v. *Georgia*, 235 U. S. 651 (1915)], but that it be adequately protected from loss pending the appeal in the event the order is reversed. *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924). Utility customers should be entitled to the same protection upon the reversal of an order increasing rates. The only practical remedy avail-

able to them is restitution of excessive rates they were compelled to pay while the appeal was pending. Whether this relief is afforded through administrative channels or through judicial process is unimportant so far as constitutional guarantees are concerned. But by providing no administrative remedy and at the same time taking away all established common law remedies, the legislature has denied the customers due process just as effectively as the utility is denied due process if it is compelled to furnish services at rates that may later be held to be confiscatory.

CONCLUSION

It is submitted that, as construed by the Supreme Court of Ohio, the Ohio public utility statutes deprive these appellants of their property without due process of law and violate the Constitution of the United States and the Fourteenth Amendment thereof, and that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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